Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 743

DANIEL P. WOOLLEY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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The petitioner, Daniel P. Woolley, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on August 15, 1941.

Opinions Below.

The opinion of the United States Board of Tax Appeals is reported at 39 B. T. A. 802 (R. 14). The opinion of the Circuit Court of Appeals is reported in 122 Fed. (2d) 167 (R. 77).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 15, 1941 (R. 81). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

In 1933 petitioner created a trust, naming his wife, Ethel Y. Woolley, trustee and naming his infant nephew, Robert W. Gardner, Jr., his wife and himself as contingent beneficiaries. On June 19, 1934, he executed supplementary documents terminating the trust as of January 1, 1937, and relinquishing all power of revocation. The question presented is whether the trust income for that portion of the year subsequent to June 19, 1934, is taxable as the grantor's income under Section 22(a) of the Revenue Act of 1934.

Statutes Involved.

The pertinent statutes involved are set forth in the appendix, infra, pages 10-11.

Statement.

The facts as found by the Board of Tax Appeals (R. 14-25) are in substance as follows: On February 10, 1933, petitioner transferred property in trust, naming his wife, Ethel Y. Woolley, sole trustee. Under the trust instrument the trustee was empowered to take control and management of the trust property and to invest and reinvest the same and to receive the income therefrom, and after paying the reasonable and proper expenses of the trust to pay and distribute the principal thereof and the income therefrom as follows:

> (a) During the life of the settlor, to pay over and distribute the whole or any part of the net income

thereof annually, in such amounts and proportions as the trustee might in her sole, absolute and uncontrolled discretion determine, to and among one or more of the following, in accordance with their respective needs, of which she should be the sole judge, namely:

The Settlor,
Robert W. Gardner, Jr., of Asheville, North Carolina, infant nephew of the settlor,
Ethel Y. Woolley, wife of the settlor,
and to accumulate the balance of such net income, if any, for the benefit of such of the above named persons who were infants at the time of such accumulation; such income so accumulated to be paid over to the person for whose benefit it was accumulated upon his attaining the age of 21 years. The nephew, Robert W. Gardner, Jr., was the only minor beneficiary.

(b) Upon the death of the settlor to pay over to the estate of the settlor the principal amount of the trust.

The trust instrument also provided that the trustee might hold as an investment any property coming into her hands under the trust, and provided further that if the settlor should notify the trustee in writing, directing the sale or leasing of any property or the purchase of any property, the trustee should lease or sell such property or should purchase out of the funds of the trust such property as the case might be. The trust instrument provided, however, that such sale or such purchase should be at the fair market value of such property. The trust instrument also provided that the trust could be revoked in whole or in part by the settlor by an instrument in writing, executed after December 31, 1933.

On June 19, 1934, petitioner, by an instrument in writing, elected to terminate the trust as of January 1, 1937, and

on the same day, by another instrument in writing, petitioner relinquished all right of revocation of the trust.

The Board found that "none of the trust income for the period June 19 to December 31, 1934, which is here in controversy, was 'properly paid or credited during * * * (1934) to any beneficiary' ".

The Board held that from June 19, 1934, the trust was irrevocable, terminating, by its terms, on January 1, 1937, and therefore the trust income was not taxable as the grantor's income under Section 166 of the Revenue Act of 1934.

The Board further found that the interest of Ethel Y. Woolley constituted "a substantial adverse interest to that of the settlor" and held that the trust income was not taxable as the grantor's income under Section 167 of the Revenue Act of 1934.

The Board then found that the grantor was not in substance the owner of the trust corpus and held that the respondent's contention that the petitioner did not divest himself of control of the corpus of the trust, other than by power of revocation, so as to preclude its taxability to him as grantor, was without merit; and that the income of the trust from June 19 to December 31, 1934, was properly taxable to the trust for that year and not to the grantor, the petitioner here.

The case was reviewed and approved by the entire Board without dissent (R. 25).

Respondent filed a petition for review by the Circuit Court of Appeals for the Second Circuit. The Circuit Court reversed the Board, holding that the grantor was in substance the owner of the trust corpus, and that the income of the trust was taxable as the grantor's income under the rule announced by the Supreme Court in the *Clifford* case.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In not following the determination of the Board of Tax Appeals that the grantor was not in substance the owner of the trust corpus during said period;

2. In holding that the income of the trust for the period beginning June 19 and ending December 31, 1934, was taxable as the grantor's income under Section 22(a) of the Revenue Act of 1934;

3. In not holding that the Commissioner had waived reliance upon Section 22(a).

Reasons for Granting the Writ.

This case presents three important questions of federal taxation of trust income, which have been decided in a way probably in conflict with the decisions of this Court, namely:

1. Whether the determination of the Board of Tax Appeals that the grantor of a trust did not remain in substance the owner of the trust corpus is determinative of that question on review when supported by substantial evidence;

2. Whether, when at the hearing before the Board the Commissioner specifically announced his reliance solely upon Sections 166 and 167 of the Revenue Act of 1934, he may subsequently change his position to claim reliance upon Section 22(a) of the Act; and

3. Where the trial was had solely upon the theory of taxability under Sections 166 and 167, whether the appellate court may determine that the grantor remained in substance the owner of the trust corpus, and that the income is taxable as his income under Section 22(a).

(1) This Court indicated in its opinion in the *Clifford* case, 309 U. S. 331, at page 336, that the question of whether the control retained by the grantor constituted ownership

for the purposes of Section 22(a) was a question of fact which was primarily a matter for determination by the Board. It said that inasmuch as the Board's finding in that case was based upon substantial evidence, it could not be said that the "triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of Section 22(a)".

The appellate courts have been groping for the rationale of the *Clifford* case ever since its promulgation. In *Commissioner* v. *Branch,* 114 Fed. (2d) 985, the Circuit Court of Appeals for the First Circuit thought that this Court in the *Clifford* case regarded the question as one of fact. But it expressed some doubt as to whether the question was purely a question of fact. In *Helvering* v. *Palmer,* 115 Fed. (2d) 368, the Circuit Court of Appeals for the Second Circuit affirmed the Board's decision per curiam upon authority of the *Branch* case. But in *Helvering* v. *Abraham,* 115 Fed. (2d) 368, the Second Circuit reversed the Board, per curiam, upon authority of the *Clifford* case, although the Board of Tax Appeals had made no finding as to whether the grantor did or did not remain in substance the owner of the trust corpus.

In *White* v. *Higgins,* 116 Fed. (2d) 312, the Circuit Court of Appeals for the First Circuit, again commenting upon the *Clifford* case, stated that the Supreme Court "seems to regard the basic issue whether the grantor remains in substance the owner of the trust corpus as a question of fact, calling for appropriate finding by the trier of fact".

In *Commissioner* v. *Berolzheimer,* 116 Fed. (2d) 628, the Circuit Court of Appeals for the Second Circuit, after some discussion, concluded that while the question was one primarily for the Board's determination, nevertheless that determination was subject to judicial review.

And in the present case the Court reversed the Board upon authority of the *Clifford* case, apparently assuming, without any discussion on the point, that the Board's finding was subject to judicial review, regardless of whether supported by substantial evidence.

On the other hand, in *Commissioner* v. *Central National Bank of Cleveland,* 119 Fed. (2d) 470, the Circuit Court of Appeals for the Sixth Circuit took the view that the Board of Tax Appeals was entrusted with exclusive authority to determine whether the grantor remained in substance the owner of the trust corpus; and remanded the case to the Board for further hearing and determination.

The Board's finding in the present case is supported by substantial evidence, despite the fact that the issue of taxability under Section 22(a) was waived at the time of hearing (R. 47-49). The grantor here was not the trustee; the trustee not only had power and control over the trust income and corpus but she exercised that power; her demeanor on the stand supported her declaration of independent power and control; she exercised her discretion over the distribution of the income, distributing part for the benefit of their nephew, who was not a member of their household or immediate family*; and the grantor in fact exercised no power of control over either the trust corpus or income.

This case, therefore, presents the question of whether the Board's finding is one of fact or whether it is a determination subject to judicial review, even though supported by substantial evidence. The question is a recurring one, which has been variously answered in the different appellate decisions. It is of sufficient general importance to warrant determination by this Court.

Moreover, if it can be said that the *Clifford* case does hold that the question is one of fact,** petitioner submits that the decision in the present case is in conflict with the *Clifford* case.

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* The nephew's father and mother were living and were financially able to maintain and support him. Petitioner had no moral or legal obligation to provide for him. Nor did he live with petitioner or in petitioner's household during or prior to the taxable year.

** As pointed out above, the Circuit Court of Appeals for the First Circuit so interpreted the *Clifford* case in *White* v. *Higgins,* 116 Fed. (2d) 312.

(2) In *Helvering* v. *Wood,* 309 U. S. 637, 60 S. Ct. 807, this Court held that inasmuch as the Commissioner had definitely excluded all contentions other than taxability under Section 166 before the appellate court, the question of taxability of trust income to the grantor under Section 22(a) could not be raised for the first time on petition for certiorari.

At the time of trial in the present case, the Board member asked for a specific declaration of the basis for the Commissioner's contentions. Counsel for the Commissioner and for the taxpayer agreed specifically that the only issue as to taxability was based upon Sections 166 and 167 of the Revenue Act of 1934 (R. 48). The trial was had upon that theory.

Is not such a waiver fully as effective as that in the *Wood* case, and for the reasons there stated? The two waivers were substantially the same except that in the *Wood* case the section upon which sole reliance was placed was Section 166, whereas in the present case sole reliance was specifically limited to Sections 166 and 167. The *Hormel* and *Richter* cases* are not in point inasmuch as there was in those cases no specific waiver.

If the *Wood* case, supra, is controlling, and petitioner respectfully submits that it is, the Court's decision in the present case is in conflict therewith.

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* *Hormel* v. *Helvering,* 312 U. S. 552; *Helvering* v. *Richter,* 312 U. S. 561.

Conclusion.

This case presents the questions:

1. As to whether the Circuit Court of Appeals should have accepted the Board's determination that the grantor did not remain in substance the owner of the trust corpus; and

2. Whether, by his waiver at the time of trial, the Commissioner is foreclosed from relying upon the broader ground of Section 22(a).

Petitioner submits that these questions are of general importance and that the action of the Circuit Court of Appeals is probably in conflict with the decisions of this Court in similar cases; and therefore this petition should be granted.

Respectfully submitted,

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